1. FEAR NOT!

1–001 Reading cases for the first time can feel like reading something in a foreign language that you have yet to master. You might recognize some words, but they make no sense in the new context. Judgments document the decision and reasoning of the courts and are written by judges, usually for lawyers. They generally contain legal jargon and are structured for a legal mind. Moreover, some of the cases you read might have been decided more than a century ago, so the style of writing will feel unfamiliar. Sometimes, even present-day judges use complicated sentence structures and awkward syntax.

1–002 Already a little overwhelmed and uncertain in your first days of law school, you may find case reading adds to your sense of insecurity. The authority vested in judges can also compound the problem: faced with difficulties or ambiguities in the cases, you might lack the confidence to consider whether this reflects a weakness in the judge's legal reasoning. Instead, you automatically assume that you are just not "getting it"!

1–003 This chapter aims to demystify judgments by offering a few different ways of thinking about them. It will also provide some tips, using some case examples to demonstrate how to read cases effectively and efficiently. Case reading does not have to be painful. Instead, think of it as exercise for your legal muscles. It provides not only a window into some of the finest legal minds (the judges), but also stories about disputes and their resolution and the characters involved in the development of law.

(a) *What is a judgment?*

1–004 A preliminary note: judgement (with an e) is not always the same as judgment. The difference is a point of grammar and substance, a tale of the evolution of language and a trans-Atlantic debate. In Britain, judgement (with an e) is still considered correct spelling for general usage, although since the 19th century judgment (without e) is more commonly used. US usage, however, spells the word always without the e. In a legal context when referring to the decisions of cases, judgment (without e) is used both in Britain and the USA. In Hong Kong, when discussing law, judgment (without e) should be used.

1–005 It might be useful, however, to think about judgement (with an e) as the mental process through which the judgment (without e) is decided. Judgment, in some ways, is a record of the application of judgement.

1–006 Even judgment (without e) can mean different things in different contexts. It can refer to the opinions authored or co-authored by one or more judges who

constitute the bench. It can also refer to a court's reasoning and its decision: the sum of its parts, the parts being the opinions of individual judges.

(b) *Every judgment is a lie*

1–007 Justice Albie Sachs, who was appointed as a judge to the Constitutional Court of South Africa by Nelson Mandela in 1994 and served until his retirement in 2009, reflected on his role as judge:

> *How do I actually make my decisions and write my judgments (referred to in the United States as opinions)? When teaching a course at the University of Toronto I opened with the words "Every judgment I write is a lie." It captured the attention of the students. I explained that the falsehood lay not in the content of the judgment, which I sought to make as honest as possible, but in the discrepancy between the calm and apparently ordered way in which it read, and the intense and troubled jumping backwards and forwards that had actually taken place when it was being written. I felt a need to dispel the notion, induced by the magisterial tone we judges conventionally adopt, that judgments somehow arrive at their destination purely on rational autopilot. This led me to find out that there were four different logics involved in any judgment I wrote: the logic of discovery, the logic of justification, the logic of persuasion, and the logic of preening.*[1]

1–008 The idea of a "judgment" – particularly for a case that has reached the highest appellate courts – implies that there is no inevitable outcome. The issues are so contested that they need the intervention of the finest legal minds. So, the "lie" might also be called a sleight of hand. Like an effortless illusion created by magicians after years of practice, a judgment gives the appearance of inexorable logic: Of course, the only possible decision is the one I have made. Yet, it rests on a process that is often disordered, contentious and difficult.

1–009 As Justice Sachs so candidly admits, a judgment that is polished, well-reasoned and persuasive hides the hesitations, revisions and uncertainties of the legal reasoning process. There is an "enormous incongruity" between the "surface character" of judgments as they are published and the "actual intellectual programme in terms of which they have been devised, created, constructed, and formalised."[2] Yet whatever the efforts of the judge, the judgment remains an artefact of the process. In a judgment there often remain traces of the processes that led to the final product, the to-ing and fro-ing, the complexities and the uncertainties. The reader thus becomes an

1 Albie Sachs, *The Strange Alchemy of Life and Law* (Oxford University Press, 2009), pp 7–8.
2 *Ibid.*, p 51.

archaeologist, attempting to unearth signs of intellectual struggle beneath the judgment's polished surface: What are the elements in contention? What was the process of evaluation? What weight did the judge accord each element?

1–010 To grasp the judgment in full involves reading with it, but also reading against it. You must seek to uncover what the judgment is disclosing, but also what it hides. This may sound esoteric, but a bit later in this chapter a demonstration of its practical application is provided in a close reading of two cases: *Jameel (Mohamed) v Wall Street Journal Europe Sprl*[3] and *Donoghue v Stevenson*,[4] an often-cited case that students rarely read in full.

(c) *Every judgment tells stories*

1–011 The origin of every case is a dispute. In every dispute there is a story with protagonists who have divergent views and want different things. In every judgment there is a retelling of that story. In the retelling, other stories are born.

1–012 The originating dispute is the first story, contained in a rehearsal of the facts in judgments. Yet by the time a case reaches appeal and a judgment is written, the originating dispute may be hard to discern. The dispassionate and rational judgment is a distillation, an end product that seems worlds away from the grievance that set the judicial process in motion. Even if a case reaches its conclusion on an obscure legal point in an appellate court, it is important to keep in mind the first disagreement and understand the relationship between the judgment and the dispute. In some cases, the judgment on an intricate legal point will have a surprising impact on the actual dispute itself: success in winning a legal argument does not necessarily mean that the parties involved in the case will get the result they want.

1–013 In the English case of *R v Ghosh*,[5] a surgeon appealed against his conviction under the UK Theft Act 1968. His lawyers argued that, at trial, the judge had misdirected the jury as to the meaning of dishonesty under the Act. Three judges heard the appeal, but delivered a single judgment. The court considered, in great detail, whether the test of dishonesty is objective or subjective, finally arriving at a two-part test. Yet, although the trial judge did not direct the jury to apply the two-part test, the Court of Appeal held that, based on the facts of the case, the jury would have found the appellant dishonest even if the correct test had been applied. That is, although the Court of Appeal essentially agreed with the appellant's argument – that the judge had misdirected the jury as to the meaning of dishonesty under the

3 [2007] 1 AC 359.
4 [1932] AC 562.
5 [1982] QB 1053.

Act – the appellant nevertheless failed in his appeal because the court found that no miscarriage of justice had occurred. Mr Ghosh remained convicted of dishonesty despite the misdirection; his win on a legal point did not lead to his desired outcome of having his conviction overturned.

1–014 The difference between winning on a legal point and winning the case also demonstrates the difference between the reasoning and the decision. Was the appeal allowed or dismissed? Who won the case? These are the questions that journalists and those interested only in the outcome of a dispute ask. For a lawyer, however, the interest lies not merely in the outcome, but in the reasoning underlying the decision. The judgment is a record of the reasoning, a display of the judicial judgement (in British usage).

1–015 To look at it another way, in mathematics there are equations that can be solved. There is one answer, often a number: x = 10 or y = 19. The solution, however, is the process of finding the answer, a series of logical moves made in accordance with the rules of mathematics and written down. The "x = something" is usually the final line, signifying success and resolution. Yet the answer is not the most interesting part. The process of thinking through the question, as documented in the long-form solution, can demonstrate elegance and creativity.

1–016 Similarly, the judgment tells a story of logic and reasoning. By laying out the thinking process, a judge or court tries to convince the legal community (and the public at large) of the rightness of their decision. The legitimacy of a court's decision does not derive only from its position in the judicial hierarchy. Instead, the judgment is a document of intellectual seduction. Judges are storytellers, spinning a legal narrative that must catch readers in its thrall. It convinces not by pure logic, although its reasoning must be sound. Instead, it woos through the beauty of its reasoning.

(d) *Every judgment is a character in a larger (jurisprudential) story*

1–017 A judgment operates on two levels simultaneously: it tells stories and it also becomes part of a larger story of jurisprudential development. If precedents are characters within a judgment, then the judgment itself becomes a character that may feature in a subsequent judgment. In one sense, a judgment is an act of self-creation. It comes into being through its own account of its history.

1–018 When reading a judgment you need to keep both these levels of operation in mind. It is important to understand both the internal reasoning of a judgment (using precedents) and the relationship between the judgment and future decisions (judgment *as* precedent). This also means developing a bifocal understanding of the doctrine of precedents operating both within and outside of the judgment.

1–019 To put this more concretely, *Donoghue v Stevenson*[6] was written into existence through the act of reasoning and judging, using precedents such as *Heaven v Pender*[7] and *George v Skivington*[8] to justify a particular conclusion. This is the story that it tells. *Donoghue v Stevenson* was subsequently used as a precedent (or character) in *Grant v Australian Knitting Mills*.[9] In that case, the House of Lords used *Donoghue v Stevenson* – among other lesser known cases such as *Medway Oil and Storage Co v Silica Gel Corporation*[10] and *Cammell Laird & Co v Manganese Bronze and Brass Co*[11] – in its own story about the development of law and its relevance to the dispute at hand.

1–020 This is the doctrine of precedents in operation. One might think of each case as a Russian doll with many other cases nestled inside it. Or perhaps one can visualize cases as an interlinking chain, one following another. Neither of these metaphors is completely accurate as law does not always move incrementally in a linear fashion. Judges can also, within the rules of *stare decisis*, choose the cases (or dolls) that are nestled within the case at hand. Whichever metaphor you choose, it is important to understand the relationship between cases.

(e) *Judges are human*

1–021 Judges are intimidating people at first glance. In court, they are seated high up, literally looking down on everyone else. They are vested with enormous authority and are usually among the finest legal thinkers of any jurisdiction. However, it is important to remember that judges are human. When you become more proficient at case reading, you will also develop familiarity with certain judges whose judgments, delivered over the course of their long careers, you will encounter repeatedly.

1–022 Judges have their own distinct personalities, habits of mind and voices. For example, some judges will tend to stick to black-letter law; that is, to take a technical and strictly legal approach. Others will have a more rights-based approach and address the legal issues in a broader social and political context.

1–023 Case reading is an opportunity to become acquainted with judges through their writing. It is important to demystify the judgment: judges are human, they are presenting an argument. In law no opinion is sacred: long-held orthodoxies have been reversed. It is okay to disagree with a judge, to critique the judgment, as long as you have the evidence to support your arguments. All this is part of critical thinking.

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6 [1932] AC 562.
7 (1883) 11 QBD 503.
8 (1869) LR 5 Ex 1.
9 [1936] AC 85.
10 33 Com Cas 195.
11 [1934] AC 402.

(f) *The* ratio decidendi *is a product of legal reasoning*

1–024 One of the first things students are asked to do is to spot the *ratio decidendi*; that is, the reason or rationale for a decision. In doctrinal law classes, where you are learning about particular areas of law, such as contracts and torts, it often seems that the only reason you read any case is to try to find the *ratio*. Yet identifying the reason from among the pages and pages of a judgment is a tricky task.

1–025 A *ratio* can sometimes be the "aha!" moment of a decision, the reason why a court reaches a particular decision. The *ratio* has to be important in the sense that it must have an impact on the outcome of the case. Generally, the *ratio* is developed by judges as a part of their legal reasoning in answer to a crucial legal question arising from the case. It often comes near the end of a discussion on a particular legal point or of the judgment itself.

1–026 In most cases, we consider the *ratio* of a case to be the reason for the majority decision. However, sometimes judges will write separate decisions even when they agree on the outcome. In such cases, it is important to consider whether there are sufficient commonalities between the judgments for you to distil a *ratio*. However, if the majority judges approach a question in a completely different way, it may be difficult to distil a single *ratio*. Instead, such cases offer fertile ground for creative argument for subsequent cases and a *ratio* may emerge through later uses or interpretations of the case.

1–027 It is not always possible to spot the *ratio* through one preliminary reading. Sometimes only multiple close readings can reveal it. Patience and perseverance are required.

2. RULES FOR EFFECTIVE CASE READING

(a) *Rule 1: Read the full judgment (not just the headnote)*

1–028 One of the most elementary errors that students make is to read the headnote instead of the judgment. This error seems to have two causes. First, students are relying on the headnote for a digest of the case and believe that this is both accurate and sufficient. Second, students do not seem to realize that the authors of the headnote and the judgment are different.

1–029 A judge does not write the headnote. The publisher of the law reports usually hires editors (occasionally law students) to summarize the judgment and write the headnotes. The headnotes are a part of the value-added services of a law report; they are not the judgment.

1–030 A judgment is written by the judge. This may seem obvious, but it often eludes students. The judgment is the "real deal". It is where judges demonstrate

their legal reasoning, dazzle us with their mastery of logic and principles and try to persuade us that their adjudication of the dispute is correct. When a case is cited, it is the judgment (and not the headnote) that is pressed into service.

1–031 Mistaking the headnote for a judgment can have the most embarrassing consequences. Occasionally in student competition moots, students cite a case to the moot court only for the judge to point out that the quotation comes from the headnote and not from the body of the judgment itself. This is particularly awkward when the judge of a moot is a "real" judge from the courts. The imaginary audience for your legal arguments as a law student (and beyond) is the bench: the judges. The best evidence that can be used to convince a judge of your legal reasoning is the judgment itself; that is, the words actually used by a judge. Quoting from the headnotes demonstrates flagrant disrespect for judges. If they take the time to write a judgment in a case you are seeking to rely on, you should take the time to read it.

1–032 The other common error is to neglect dissenting views. Stressed and short of time, students often read a case only to identify the rule rather than trying to understand the legal reasoning that leads to the rule. Students try to "save time" by skipping the dissenting judgment: Who cares about the minority view? An incomplete reading of the case does not provide the full picture. Dissenting judgments are particularly interesting and can offer insights into critiques of the majority position and alternative ways of thinking about a question.

(b) *Rule 2: Read the judgment repeatedly (once is never enough)*

1–033 It is useful, before you attempt a close reading of the case, to first read it quickly to get a sense of its structure and flavour. It is important to identify where the headnote ends and the judgment begins. In the first reading, ask yourself some anchor questions (see Rule 3). Then, read it again (and possibly again and again, at least in part) in order to deepen your understanding of the case. The goal is to be able to follow the legal reasoning applied and to evaluate the strengths and weaknesses of the argument.

1–034 As you become more proficient in reading, the process will get faster. In all likelihood, you will probably still read the case at least twice, but how you read will change. You will be able to locate the relevant passages faster and understand where to focus your attention. Particularly in a long judgment that deals with several legal issues, you will be able to zoom in to the sections most relevant to you and understand which passages require the most attention (see Rule 4).

(c) *Rule 3: Anchor yourself*

1–035 In your first reading(s) of the judgment, try to answer the following questions in order to orient yourself. Understanding a long and complex

judgment is sometimes like trying to sail through uncharted waters. It is important to create anchors for yourself, markers that help you position yourself in what might feel like an ocean of words.

Some anchor questions you should be able to answer fairly quickly might include: **1–036**

- Who are the parties?
- Which court heard the case?
- How many judges are there?
- Is it an appeal? If so, is this the first or second appeal?
- What was the originating dispute?
- Who won in the lower courts?
- What is the outcome of the case? Who "won"?
- Is this a unanimous decision of the court?
- If not, how is the court split?
- How many judgments are there?
- Do judges agree on the outcome but still write different judgments?
- What are the issues being argued?
- What is the *ratio decidendi*? While it is not always possible to find this during the preliminary reading, you should keep it in mind and try to answer it as soon as you can.

These are some basic questions that should help you to orient your case reading. They do not have to be answered in any specific order, but they can help you to extract the information you need for an efficient in-depth reading later on. **1–037**

It is like reading the end of a detective novel or a whodunit thriller, finding out who the killer was and then going back to look for the clues that would have taken you to that conclusion. If you know what the judge's decision is, it is easier to follow the reasoning that led to it. Similarly, if you can quickly identify the central issues that are troubling the judges, especially any points of dissent, it will be easier for you to detect the disagreements of central legal significance. **1–038**

(d) *Rule 4: Be alert and pick up clues*

It is important to understand why you are reading any given judgment. Earlier under Rule 2, I referred to the idea of "zooming in" to the relevant passages to become more efficient and effective in case reading. To be able to identify what is relevant implies that you read with a goal in mind. (Re)reading a case is different to reading a novel: it is not exploratory, but targeted and intentional. **1–039**

Unless you are someone who reads judgments for fun, the purpose of your reading is to answer a legal point. It is important to remember the legal **1–040**

2–001 In contrast to case law, students often perceive reading legislation to be relatively easy. Acts, ordinances and other pieces of legislation seem superficially straightforward, with definitions, clauses, sections and subsections all set out in an orderly fashion, a bit like a dictionary you can use as a reference when you have a question about an area of law. The language of well-drafted modern legislation is usually fairly simple. It may include some jargon related to the subject matter, but generally the words do not seem unfamiliar. Absent is the sense of alienation felt when confronted by a judgment. Better yet, the statute seems a self-contained universe: it states the law on a particular subject! Legislators, after all, are the undisputed lawmakers under the doctrine of the separation of powers.

2–002 As this chapter will demonstrate, however, legislation is deceptive. Reading the text of the statute is not the same as understanding the legislation. Using statutes and statutory instruments from Hong Kong and elsewhere, this chapter provides some rules to help you read legislation effectively and go beyond the text of the statutes. Words are powerful and nowhere more so than in legislation. Words in statutes can create realities in the world, consequences that have a real impact on the lives of those subject to the legislation. Reading legislation, therefore, is not just a literary exercise. Instead, it demands all your critical faculties and your imagination.

1. FROM WORDS TO LAW: READING AND INTERPRETING STATUTES

(a) *What is legislation?*

2–003 Legislation refers to the body of laws brought forth by the legislature in the form of statutes. To find laws made by the legislature, we turn to volumes of acts or ordinances (primary legislation), as well as subsidiary legislation made by delegated authorities, such as rules, regulations, by-laws, orders and so on.

2–004 The word legislation has its roots in Latin and means "bringing of a law". But legislation is not law. Despite common usage which often considers "law" and "legislation" as synonyms and interchangeable, a conceptual distinction is important. Legislation consists of pieces of texts, a literary product. Law is a system (which includes legislation and judgments) that shapes our conduct and behaviour. For legislation to become law, it must do something more than exist as words on a page.

2–005 Like judgments, legislation is a record of a decision. Case law records the reasoning of judges when they decide a dispute. Statutes are a record of the legislature's decision in a sphere of social life. The purpose of the statute is to regulate our behaviour: everything from electoral processes, to the building of infrastructure, to how public money is spent, to the details of

our day-to-day lives – who we can marry, how we can divorce, the tax we pay, the money we save and how we drive. Just as judges struggle to make their logic clear and persuasive in their opinions, so the legislature struggles with how to best capture and convey its intentions on a particular subject. The basic purpose of legislation is to communicate to its audience – society or sections of society – "Do this! Don't do that!"

(b) *Words, words, words*

2–006 Legislation does not write itself. Someone drafts the legislation – usually civil servants with law degrees in the relevant department. The Law Drafting Division of Hong Kong's Department of Justice (DOJ) describes legislative drafting as:

> *[T]he art of converting legislative proposals into legally sound and effective law. Although it is important that legislation is written in clear, easily understood and unambiguous language, legislative drafting is not a mere literary exercise.*
>
> *Legislation is the framework within which a society functions. The rights and obligations of individuals and organizations in a society are determined primarily by legislation. […] the drafter of the proposed legislation needs to conceive a legislative scheme to give effect to the proposals. The next step is to consider how best to communicate those concepts to a diverse group of statute users.*

The quote exemplifies the dual aspects of legislative drafting – the conceptual aspects, in which the drafter ascertains and perfects the concepts to be employed in the draft, and the literary aspect, in which the drafter selects the best means of expressing those concepts.[32]

2–007 Words are the bridge between the intentions of the legislature and what happens in the world beyond legislation. They are the vehicles through which the "dual nature" of legislative drafting is expressed. Words are chosen – often carefully and after much debate – in order to give effect to the legislative scheme envisioned by the legislators.

2–008 Therefore, when reading statutes, the words on the page are your starting point and what you always return to. The general rule is that a piece of legislation means exactly what it says: there are no interpretative questions unless there is ambiguity in the statute itself. Yet despite the care that goes

32 Department of Justice Law Drafting Division, *How Legislation is Made in Hong Kong: A Drafter's View of the Process*, 2012, online at http://www.legislation.gov.hk/blis/eng/pdf/2012/drafting2e.PDF [Accessed 6 July 2015].

into legislative drafting, words, sentences and clauses can sometimes mean different things to different readers. When there is a disagreement about what legislation might mean, you return to the words. The precise words themselves contain within them the possibilities of interpretation: the words give potential for flexibility but also limit the variety of meanings that can be imposed.

2–009 For example, the case of *W v Registrar of Marriages*, discussed in the previous chapter, considered the word "woman" in the context of the Marriage Ordinance.[33] The Court of Final Appeal found that when the rules of statutory interpretation are applied to the word, it cannot mean anything other than a biological woman. The outcome of *W* was achieved not because the court could interpret the word "woman" to include transgender women, but because the legislation – having excluded transgender women – was unconstitutional. Instead of striking down the Marriage Ordinance, the court – deferring to the legislature so that it can properly exercise its powers – ordered legislative reform. As a backup plan, in case the legislature did not do its job, it also offered an interpretation to preserve the Ordinance so that the laws around marriage were not left in disarray. That remedial interpretation, which can only be used in limited circumstances, is that to save the Ordinance from its unconstitutional self, the word "woman" includes transgender women.

2–010 This, of course, is precisely the result *W* argued for. However, just because the outcome was the same, it does not mean that "woman" in the Marriage Ordinance could ordinarily include transgender women. It is precisely because statutory interpretation could not expand the scope of the word "woman" in the context of this statute that the Ordinance was found to be unconstitutional. Woman, in this case, could not mean post-operative transgender woman.

(c) *Legislation as a living thing*

2–011 A judgment, once handed down by a court, cannot be revised, reissued, cancelled or otherwise changed. Once a judgment is handed down, it is done. Any errors can only be corrected through appeal, if it is available. Any "bad" decision made by a judge stays relevant, unless it is overruled by a higher court in a subsequent case. In other words, though law itself may change, judgments cannot be rewritten. By contrast, statutes are living things: once enacted, the legislature can make subsequent modifications to it by amendment. Or, if the statute is no longer relevant or has been superseded, the legislature can repeal it. A statute is born, can change and can die.

2–012 As statutes are trying to shape the way we behave, the legislature will try to keep them updated and amended to reflect the changing times and the needs of

33 [2013] 3 HKC 375.

society. In Hong Kong, for example, the new Companies Ordinance (Cap 622) commenced operation on 3 March 2014 after a long legislative process. Its predecessor, Companies Ordinance (Cap 32) was substantially amended under section 912 and Schedule 9, which changed the short title of Cap 32 from "Companies Ordinance" to "Companies (Winding Up and Miscellaneous Provisions) Ordinance". The earlier Ordinance (Cap 32) first came into force in 1933 and its last substantial revision was in 1984. Significantly, this revision was before the resumption of China's sovereignty over Hong Kong and the old Ordinance was broadly in line with UK company laws such as the Companies Act 1948 and subsequent reforms, including the Companies Act 1976.[34] Although Cap 32 had been amended several times after 1984, this piecemeal approach was considered to have reached its limit. In order to secure and enhance Hong Kong's future as a major international financial and business centre, a comprehensive rewrite of the Ordinance was launched in mid-2006.[35]

2–013 However, the question of how and to what extent legislation should reflect social changes remains a much-debated question. In many jurisdictions, the legislative process includes a built-in mechanism of public consultation, which is intended to ensure that legislation enacted reflects public opinion and takes into consideration the varying interests of affected parties.

2–014 In Hong Kong, for example, if the government intends to propose new legislation or amend existing ones, it will consult with the parties affected. The Law Reform Commission may be tasked with researching and reporting on the subject matter. Alternatively, the relevant government authorities or departments may also release consultation papers inviting interested parties to submit their views. For the Companies Ordinance (Cap 622) the Financial Services and the Treasury Bureau began consultations about a possible rewrite in 2007. Subsequent rounds of consultations followed in April and June 2008. The first phase of consultation of the draft Companies Bill was issued in December 2009 and the second phase of consultation on the draft Bill began in May 2010, followed by consultation on a specific issue under the proposed Bill in December 2011. The new Ordinance was finally passed in July 2012. Yet two more rounds of consultation, relating to subsidiary legislation, followed in September and November 2012.[36] In the first four months of 2015, for example, the government sought the views of the public on 15 issues including – after the Occupy Central Movement of 2014 – the

34 Financial Services and the Treasury Bureau, *Second Public Consultation on Companies Ordinance Rewrite* (2 April 2008), p 4, online at http://www.cr.gov.hk/en/publications/consultation20080402.htm [Accessed 6 July 2015].

35 *Ibid.*

36 Financial Services and the Treasury Bureau, "Companies Ordinance Rewrite- Publications and Press Release", online at http://www.fstb.gov.hk/fsb/co_rewrite/eng/pub-press/consult.htm [Accessed 6 July 2015].

Method for Selecting the Chief Executive by Universal Suffrage.[37] Yet despite the extent of consultations, whether – and to what extent – you consider the views of the public to have been adequately encapsulated in the legislation as drafted might depend on who you are.

2–015 Occasionally, however, older pieces of legislation remain effective even if they are unenforced. For example, in England and Wales, the 1313 Statute Forbidding Wearing of Armour forbids any Member of Parliament from wearing armour in the House. This statute was originally passed during a time of political turmoil and was intended to promote Parliament as a peaceful place rather than an extension of the theatre of war. Despite its ancient origins, the statute remains in force even though the likelihood of someone wearing armour now anywhere, including the Houses of Parliament, is rather negligible.[38] Similarly, under section 55 of the Metropolitan Police Act, it remains an offence to fire cannons within 300 yards of a dwelling house. Another statute that remained in force, perhaps too long, until its repeal in 1960 was the Unlawful Games Act 1541. Under that Act, every Englishman between the ages of 17 and 60, subject to some exemptions, was required to keep a longbow and regularly practise archery.[39] These antiquated statutes remain in force, sometimes out of benign neglect. Yet because they are in force, they may be called upon to operate in a world very different to that in which they were conceived.

(d) *The biography of legislation*

2–016 Legislation is an organic, living thing. To understand legislation, we must consider its past, present and future. Reading a piece of legislation involves understanding, and sometimes imagining, its biography.

2–017 The past is its legislative history, the process that gave birth to the statute under consideration: the consultations, debates and drafting, the people involved and the decisions made. The present is the document itself, the statute as it is enacted: the words on the page, a textual artefact of the consultations, debates and decisions made in the drafting process. But legislation also has a future, its transformation into law, the force that shapes our behaviour in the world. The words on the page have an impact on shaping the world we live in. To understand a piece of legislation fully, you must start with the words on the page, but you also have to move beyond them.

37 See past and current consultation papers from the Hong Kong government at http://www.gov.hk/en/residents/government/publication/consultation/archives.htm and http://www.gov.hk/en/residents/government/publication/consultation/current.htm, [Accessed 6 July 2015].

38 The seven-hundred years old *A Statute forbidding Bearing of Armour* (1313) can be found electronic here: http://www.legislation.gov.uk/aep/Edw2/7/0. Note that the original text of the Act was not modern English, and a translation is required [Accessed 15 July 2015].

39 Law Commission, *Legal Curiosities: Fact or Fable?*, online at http://lawcommission.justice.gov.uk/docs/Legal_Oddities.pdf, [Accessed 6 July 2015].

2–018 One of the best pieces of legislative biography is a podcast produced by RadioLab called *60 Words*, one of the winners of the 2014 Peabody Awards.[40] Based on an earlier journalistic article by Gregory D Johnsen,[41] the podcast tells the story of just 60 words of the Authorization for the Use of Military Force (AUMF), a statutory instrument. It was drafted immediately after the September-11 attacks on the World Trade Center in New York and passed as a Joint Resolution of the Senate and the Congress on 18 September 2001. It reads:

> *That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.*[42]

2–019 These 60 words are the present, the text itself.

2–020 Looking forwards, from the date the Joint Resolution was passed to July 2013, these 60 words were the basis of more than 30 publicly disclosed occurrences of the use of military action as well as related actions such as detentions (including at Guantánamo Bay) and military trials. The number of covert operations, such as drone strikes, renditions and other secret operations, is likely to be much higher[43]. According to the Congressional Research Service,[44] under the Bush Administration, the AUMF was used 18 times and President Obama has used it another 12 times. Countries that have been on the receiving end of such actions have included Afghanistan, Ethiopia, Georgia, Iraq, Somalia and Yemen. The consequences of these strikes were profound. One investigation into six strikes in Yemen in 2009 and 2012-13 by Human Rights Watch found that they had killed 82 people,

40 Radiolab (18 April 2014), *60 Words* [Audio podcast], retrieved from http://www.radiolab.org/story/60-words/, [Accessed 6 July 2015].

41 Gregory D Johnsen, "60 Words And A War Without End: The Untold Story of The Most Dangerous Sentence in U.S. History", *Buzzfeed.com*, 17 January 2014, online at http://www.buzzfeed.com/gregorydjohnsen/60-words-and-a-war-without-end-the-untold-story-of-the-most#.nuNk8GJZr [Accessed 6 July 2015].

42 United States. Cong. *Joint Resolution To authorize the use of United States Armed Forces against those responsible for the recent attacks launched against the United States.* 107th Cong. S. J. Res 23. 115 Stat. 224 (2001), online at http://www.gpo.gov/fdsys/pkg/PLAW-107publ40/pdf/PLAW-107publ40.pdf, [accessed 15 July 2015].

43 Gregory D Johnsen, "60 Words And A War Without End: The Untold Story of The Most Dangerous Sentence in U.S. History", *Buzzfeed.com*, 17 January 2014, online at http://www.buzzfeed.com/gregorydjohnsen/60-words-and-a-war-without-end-the-untold-story-of-the-most#.nuNk8GJZr [Accessed 6 July 2015].

44 Matthew Weed, *The 2001 Authorization for Use of Military Force: Background in Brief* (CRS Memorandum 7-5700), Congressional Research Service, 10 July 2013, online at http://fas.org/sgp/crs/natsec/aumf-071013.pdf, [Accessed 15 July 2015].

at least 57 of them civilians. One of the strikes was carried out using cruise missiles releasing cluster munitions, which are indiscriminate weapons that pose unacceptable levels of danger to civilians.[45]

2–021 Looking backwards, according to Johnsen, a White House counsel named Timothy Flanigan was tasked with providing the first draft of the a congressional resolution that would authorize the President to respond to those behind the September-11 attacks. A lawyer with a background in corporate law, he was out of his element as he was not an expert in national security and war. To begin, he found a precedent to help: the 1991 AUMF against Iraq. He copied and pasted the text of that resolution into a new document – a template for the new AUMF. Along with two other lawyers, Flanigan wrote the first draft, which was circulated among congressional leaders late in the evening on 12 September 2001. That draft was considered to give the President powers that were too open-ended and wide-ranging. Within 72 hours of the September-11 attacks, the drafters had come up with a revised and final version of the AUMF, containing the agreed language. Although not everyone agreed with the wording, in the immediate aftermath of an attack that killed 2,977 people, there was a sense that quick and decisive action was needed. On 14 September, the same day as the memorial service for the victims at the national Cathedral, both Senate and Congress passed the resolution. The final vote in Congress was 420-1 in favour of the AUMF.

2–022 To look backwards at the drafters who provided the text and the elected official who approved and passed the resolution, is to understand the intentions behind AUMF. To look forwards to the future that the AUMF helped to create is to understand the power of the 60 words. Where precisely in these 60 words are the seeds of a war that seemingly has no end? To answer this, we need to understand what is missing from them: there are no geographical limitation and there is no end date. These words can start a war, but not end it. Yet of all the elected officials who voted on the AUMF, only one could imagine its future as it subsequently unfolded: a Congresswoman named Barbara Lee who thought that the AUMF gave the President a "blank check".[46]

2–023 To think of legislation as having a biography is to try to understand its fullest implications in the world. Statutes begin their lives as intentions of the

45 Human Rights Watch, *"Between a Drone and Al-Qaeda": The Civilian Cost of US Targeted Killings in Yemen*, October 2013, available at http://www.hrw.org/reports/2013/10/22/between-drone-and-al-qaeda-0. It is impossible to relate specific strikes to the AUMF. However, the kinds of strikes investigated by Human Rights Watch are similar to the actions authorized under the AUMF; [Accessed 6 July 2015].

46 Gregory D Johnsen, "60 Words And A War Without End: The Untold Story of The Most Dangerous Sentence in U.S. History", *Buzzfeed.com*, 17 January 2014, online at http://www.buzzfeed.com/gregorydjohnsen/60-words-and-a-war-without-end-the-untold-story-of-the-most#.nuNk8GJZr [Accessed 6 July 2015].

legislature. Words are chosen to best represent those intentions and convert these proposals into a set of propositions on a document. That text then becomes the basis of behaviour and practices with consequences in the real world.

(e) *Legislation in the world*

2–024 Once legislation is enacted and in force, we have a document: a text with words. In some cases, like the Companies Ordinance (Cap 622), substantial public discourse prepares those affected by the legislation to adapt their behaviour to the new regime. The government sometimes embarks on something of a public education campaign. However, the sheer volume of legislation passed can be daunting and not every new law or amendment gets the same amount of public attention. There are literally thousands of pieces of both primary and subsidiary legislation in effect. There are currently more than 4,000 Public General Acts applicable in the UK,[47] though the number of acts passed each year has declined over the last few decades. Between 1950 and 2014, the most prolific legislative year was 1964, during which 98 acts were passed.[48] Even in Hong Kong, a relatively small jurisdiction, as at 1 June 2012, there were 693 ordinances in effect and 1,441 pieces of subsidiary legislation.

2–025 Most of us are, however, unaware of the content of all these pieces of legislation that can potentially influence the way we behave. This is partly because not every piece of legislation will apply to every person within that jurisdiction. In Hong Kong, for example, the Stowaways Ordinance (Cap 83) and the Sand Ordinance (Cap 147) are unlikely to have a direct impact on a law student's life. But more than that, most of us go about our daily lives on the assumption that we are acting within the bounds of law and, more often than not, this assumption remains unchallenged. The process of growing up in a particular culture or society implicitly teaches you what is right or wrong and what is acceptable. When you take on a task or profession, a part of the learning process also inculcates you with an understanding of what is, or is not, acceptable. Much of that will be aligned with the legislation in place, because legislation either codifies pre-existing behaviour or behaviour has adapted to become more or less consistent with law.

2–026 In many ways, the law only becomes visible to us, only matters to us, when it does not seem to be what we assume – or want – it to be. Like cases that arise from dispute, the operation of legislation in the world is also clarified

47 Total number of UK Public General Acts is 4,010; see http://www.legislation.gov.uk/ukpga, [Accessed 6 July 2015].

48 Rob Clements and Richard Cracknell, *Acts and Statutory Instruments: Volume of UK Legislation 1950 to 2014* (Commons Briefing Papers SN02911), 19 March 2014, online at http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN02911#fullreport. [Accessed 15 July 2015]. pp 4–5.

1. WRITING AS THINKING

4–001 To return to Justice Abie Sachs for a moment, recall his confession: "every judgement I write is a lie". He meant that in the process of writing a judgment, much of the thought process – the hesitations, revisions, and uncertainties – is disguised under carefully constructed prose. Another way to think about this is that writing is, in and of itself, a part of the thinking process.

4–002 Students sometimes imagine that they must "complete" their research or have a fully formed idea before they start writing. Yet drafting, revising, and re-drafting – the process that lies beneath the polished final product – enacts the thinking process. If you are not yet entirely sure what you are trying to say, do not stay mute and write nothing. But try to start by drafting something tentative and a thought will form. The process of revision and re-drafting is entirely inevitable.

2. LAW AS COMMUNICATION BETWEEN PEOPLE AND FOR PEOPLE

4–003 Lord Denning, in his autobiography, reflected on the art of legal writing. He describes two kinds of judgments: his own and the "usual kind". He describes judges who deliver the "usual kind" of judgments in the following terms.

> *In giving judgment he is cold and impassive. Not swayed by emotion or prejudice. Impersonal and inhuman. He does not call the litigants by their known names – John Doe or Richard Roe. But by their noms de litis – plaintiff or defendant – appellant or respondent. Quite often he gets them transposed – saying plaintiff when he means defendant – but the shorthand writer puts it right. […] No ornament or colour in his words. Precise and accurate. Even when it leads to obscurity. Even when it means long sentences – punctuated by parentheses and qualifications – rather than short ones. He drily sets out the pleadings and the orders already made. In order of date. He gives a detailed recital of facts, omitting nothing, relevant or irrelevant. He makes endless references to authorities – with long quotations of what other judges before him have said. Coming ultimately – and with professed reluctance – to a decision contrary to the justice of the case. Wiping the crocodile tears from his eyes.*[87]

4–004 Positing his own writing as the opposite of this "usual kind", he noted:

> *I try to make my judgment live – so that it can be readily understood – by the parties in particular: and by others who hear it. […] I start my judgement, as it were, with a prologue – to introduce the story. Then I go on from act to act as Shakespeare does – each with its scenes – drawn from real life […] I draw the characters as they truly are – using their real names – […] I avoid long sentences like a plague: because they lead to obscurity. It is no good if the hearers cannot follow them. I strive to be clear at all costs. Not ambiguous or prevaricating. I refer sometimes to previous authorities – I have to do so – because I know that people are prone not to accept my views unless they have support from the books. But never at much length. Only a sentence or two. I avoid all reference to pleadings and orders – They are mere lawyer's stuff. They are unintelligible to anyone else. I finish with a conclusion – an epilogue – again as the chorus does in Shakespeare. In it I gather the threads together and give the result.*[88]

87 Baron Alfred Thompson Denning, *The Family Story* (London: Butterworth, 1981), pp 206–207.

4–005 By contrasting his own writing with that of the "usual kind", Lord Denning illustrates some features of legal writing that he values. First, he wants to interest the reader, enlivening the judgment and engaging the audience by telling them a story – like Shakespeare, no less – that has an introduction, character development and a conclusion. His goal is to keep the reader interested, rather than mechanically reciting facts, chronology, pleadings and procedural history. Second, he tries to make the judgment clear and to the point, so that it is easily understood by the reader. To do so, he keeps his sentences short and refers to the characters of a case by their real names. This humanizes his judgments, in contrast to the "usual kind" which insist on using technical and impersonal terms (plaintiff or defendant, appellant or respondent) often at the risk of errors and confusion. He prioritizes clarity above all else. Although he uses authorities to support his arguments, he does so sparingly and avoids quoting long passages. Noticeably, for Lord Denning the audience he imagines for his judgments is broader than mere lawyers, so he avoids anything that would be intelligible only to lawyers. He includes the parties to the case and a non-legally trained public in his audience.

4–006 In 1999, when Lord Denning died at the grand age of 100, his obituary noted that he was "known as 'the people's judge' for willingness to override precedent to do what he saw as justice and for his simply worded judgments delivered in Hampshire burr".[89] His style, then, complemented and exemplified his idea of the law and the role of judges.

4–007 In Hong Kong, another judge who puts people at the centre of the law is Justice Kemal Bokhary, who served as a founding member of the Court of Final Appeal from 1997 to 2012 and who continues to serve as a

88 *Ibid.*, p 207.

89 Clare Dyer, "Lord Denning, controversial 'people's judge', dies aged 100", *The Guardian*, 5 March 1999, online at http://www.theguardian.com/uk/1999/mar/06/claredyer1 [Accessed 15 July 2015].

Non-Permanent Judge from time to time. Echoing Lord Denning, Justice Bokhary wrote after this retirement:

> *The law belongs to the people. Ultimately they are its only legitimate source. Their commitment to the rule of law is its greatest protection. […] The law's role is modest but vital. It is not for the law to create these fundamental rights and freedoms. But it is for the law to recognize them, articulate them and provide for their practical realization. Strongly believing in all these things, I have always desired to – and endeavoured to – help people to increase their understanding of what they can do for the law and what the law can, in return, do for them.*
>
> *That desire and endeavour is reflected in how I have worded my judgments, including the dissenting ones.*[90]

4–008 Aptly, Justice Bokhary authored two delightful volumes featuring the cartoon crocodile Crocky, a cheeky guide through the workings of the law.[91] Justice Bokhary's style – endeavouring to be understandable to non-lawyers – is used to further the goal of his legal writing: to make law understandable to people, who are the ultimate source of its legitimacy.

4–009 In the intensely competitive yet cloistered world of the law school, it is sometimes easy to forget that law is essentially a people-centred profession. Among people, communication is at the centre of all relationships and interactions. Communication is also at the heart of law. Statutes – as pieces of text – are useless unless they are communicated to their users. Contracts and agreements are futile documents except to the extent that they capture the agreement and intentions between two parties wishing to strike a bargain. Legal advice letters and memoranda are merely decoration unless they communicate to a client or a colleague. Equally, many disputes that end up before a court arise from miscommunication: agreements that do not properly reflect the bargain intended and statutes that are ambiguous.

4–010 Lawyers are invited into people's lives to help to resolve a dispute, to create or manage a relationship and to represent someone's interests. Although in practice there are oral arguments in court and meetings with clients, writing remains lawyers' primary medium of communication with courts, clients, colleagues and the public. Lawyers are every bit as much professional writers as authors and journalists. Lawyering, as a profession, can require you to be a drafter of legislation, an author of arguments and opinions and a composer of emails and advice letters.

90 Kemal Bokhary, *The Law is a Crocodile* (Hong Kong: Sweet and Maxwell, 2013), p 1.

91 In addition to *The Law is a Crocodile*, see also Kemal Bokhary, *The Crocodile at Law* (Hong Kong: Sweet and Maxwell, 2014).

4–011 Writing of any kind is improved through practice: repeatedly writing and re-writing, editing and revising. Legal writing is no different. The process of revision and redrafting often involves three crucial questions:

- What are you trying to say? (Intention)
- Why are you saying it that way? (Choices)
- Can you say that better? (Decisions)

4–012 These questions lead to a consideration of intention, choices and the potential for better decisions. It is important to recognize that writing involves an almost infinite number of choices and decisions. Some of them are made very quickly – we start to type a word, then we erase and substitute an alternative word even before we think about it. Some of the decisions are more difficult and deliberate: structure, choices of headings, tone and so on. Whether these decision are good or bad (that is, whether the writing is good or bad) can only be assessed in the context of what you are trying to say (intention). This is particularly true of legal writing, which always seeks to communicate something: an opinion, an argument, an explanation.

4–013 Legal writing does not occur in a vacuum. It always has a purpose. Lawyers, literate as they are, tend not to write for fun. They write in order to persuade the court of a certain position or to explain something to a client. It is "an inherently social activity in which a legal writer puts pen to paper in order to have a certain effect on a target audience".[92] In this sense, a piece of legal writing is "good" if it achieves its purpose. Yet, a document can be effective – achieve its purpose – even if it is poorly written. Conversely, a beautifully written submission might fail. If "effective" writing is not quite synonymous with "good" legal writing, then how can we better define it?

3. GOOD WRITING IS…

(a) *Helpful to the reader*

4–014 Just as legal writing always has a purpose, it also always has an audience: judges, other lawyers or clients. Legal writing always has a purpose and so too do its readers. A reader of legal writing is unlikely to be reading for pleasure or entertainment. Instead, the intended audience usually has particular interests and needs. They read legal documents in order to get information that will help them to make informed decisions.[93]

92 Mark K Osbeck, "What is 'Good Legal Writing' and Why Does It Matter?", *Drexel Law Review*, Vol 4, 2012, 417-467, at 11.

93 *Ibid.*

4–015 Clients read advice from lawyers because they want to understand how to act in their own best interests in an infinite variety of situations and contexts: a commercial transaction, the negotiation of a prenuptial agreement or a divorce or potential litigation. Lawyers read judicial opinions to understand the law and to try to predict how a particular legal principle might be interpreted or applied. Judges read legal writing in the form of written submissions in order to help them decide how to rule on a dispute.

4–016 So, good legal writing should be helpful to its reader. It must keep in mind the reader's interests and offer guidance for the reader. Good legal writing is less about an exhibition of the writer's legal prowess and more about serving the reader's interests and helping them to make decisions.

(i) *How to be helpful*

4–017 Emulate Lord Denning and Justice Bokhary: consider your intended reader.

4–018 Your decisions about your writing should always consider what might be in the best interests of the reader. Decisions about the content, tone, language, structure, vocabulary (and jargon) and any other facets of writing should always serve the reader. A judge, for example, might appreciate a certain level of technicality and jargon. A client, by contrast, may need things to be explained in simpler terms. A judge may be interested in the operation of precedents and a detailed analysis of legal reasoning. A client, however, may be more interested in the way in which legal principles affect his or her particular circumstances.

4–019 Although each document needs to be tailored to the reader's interests, two elements are always present in legal writing:

First, *an explanation* of the relevant legal principles.
Second, *an argument* as to how legal principles should be applied.

4–020 In almost any legal writing, explanation of the law and an argument about the law are intertwined. The mere identification of relevant legal principles and an explanation of them are of no interest to the reader. The reader wants to know how the law may operate and apply to the facts at hand. An argument about how a legal principle should be applied in any specific scenario makes little sense without an explanation of what the law is. Therefore, explanation and argument must both be present in order to be helpful to the reader.

4–021 Students are often taught to follow the ILAC structure (also known as IRAC in some cases) in legal writing: Issue, Law/Rule, Application and

Conclusion. One of the enduring mysteries for law students is how to talk about the law and its application. Following the ILAC structure, many students simply state the law in one section and then state the facts in a separate section, without demonstrating the "application" of the law to the facts. Instead of arguing that the law should be applied in a particular way to a set facts, students often simply juxtapose the two and allow the readers to draw their own conclusions, or else there is an assumption that the way in which the law should operate in the circumstances is somehow self-evident. The ILAC structure can be useful in providing a framework around which to organize your thoughts and your writing. However, it does not function as a set of four-drawers in which you can compartmentalize your ideas.

4–022 Importantly, you need to demonstrate the relationship between the law and its application to the circumstances under consideration. In Chapter 1, we looked at the way judges demonstrate their reasoning in their opinions. Helpful legal writing tries to do the same thing: pulling the argument apart and showing how you arrive at a conclusion step by step. This is particularly important if you are trying to persuade someone to reach a certain conclusion.

4–023 Moreover, a legal document should offer some answers, even if the answers are tentative as most legal writers are not judges and do not have the authority to adjudicate. Even so, the writer should still offer some predictions as to the best answer, the most probable finding of a court. Alternatively, if the purpose of the writing is to convince someone – a court, for example – of a position, then make it easier for judges to decide in your favour by offering them good reasons to do so. Provide answers, do not just raise questions. Convince the audience of the answer you want them to find.

(b) *Clear*

4–024 Clarity is a fundamental feature of good legal writing. It is the most important quality and cannot be sacrificed. Sophistication of expression, erudition, stylistic flourishes – all these and other qualities are secondary to clarity. If every piece of legal writing is intended to communicate, then it cannot succeed if the reader cannot understand the words used or follow the syntax of sentences or the logic of paragraphs.

4–025 The proposition that legal writing must be clear has had strong judicial endorsement. For example, Justice Benjamin Cardozo stated that "there can be little doubt that the sovereign virtue for the judge is clearness".[94] Lord Denning, of course, tried to be "clear at all costs".[95]

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94 Quoted in Osbeck, "What is 'Good Legal Writing' and Why Does it Matter?", *Drexel Law Review* Vol 4, 2012, 471-467, at 427.

95 Denning, *The Family Story*, 207.

(i) *How to be clear*

(A) Observe rules of language

4–026 To be clear, the starting point is the observation of some basic rules of writing: grammar and punctuation. The conventions of language are shared between writers and readers and linguistic rules help language to function and convey meaning.

4–027 Some writers – such as the poet E. E. Cummings – ignore such rules to achieve certain effects. They suggest multiple meanings by being deliberately ambiguous, create gaps for interpretation, evoke a sense of rhythm or convey a certain atmosphere and ambience.

4–028 In most cases, however, this is the opposite of what a legal writer is trying to achieve, albeit some instances of legislative drafting may strategically leave space for interpretation. Compliance with the basic rules of language on grammar, syntax and semantics is a fundamental feature of good legal writing. The more you deviate from standard language rules, the more difficult it is for your readers to follow. Notice that this also detracts from the overall helpfulness of your document.

(B) Use plain English as much as possible

4–029 In the last few decades in common jurisdictions such as the UK, the USA and Australia, the plain English movement has advocated that legal writers use ordinary words and simple sentences and avoid legalese and incomprehensible writing. In the UK, the Plain English Campaign began in 1979 and has aimed to eliminate "gobbledygook, jargon and misleading public information".[96] In law, the plain English campaigners argue that people's ability to exercise rights and fulfil their responsibilities depends on their ability to understand them.

4–030 Legal documents usually set out rights and responsibilities and, therefore, need to be accessible and understandable to a wide audience. The UK's Unfair Terms in Consumer Contracts Regulations 1999 stipulate that terms in consumer contracts must be written in "plain, intelligible language".[97] Except in cases where injunctions are sought, if there is ambiguity in a written term, the interpretation that is most favourable to the consumer prevails.[98] In the USA, federal legislation enacted in 2010 requires that federal agencies

96 Plain English Campaign, "About Us", online at http://www.plainenglish.co.uk/about-us.html [Accessed 15 July 2015].
97 Rule 7(1).
98 Rule 7(2).

use "clear Government communication that the public can understand and use".[99] In 2011, President Obama issued an Executive Order – Improving Regulation and Regulatory Review – which states that the regulatory system must "ensure that regulations are accessible, consistent, written in plain language, and easy to understand."[100] Two earlier Executive Orders also required the Office of Information and Regulatory Affairs to provide public information in "plain, understandable language" and to use "clear language" in legislation relating to civil litigation.[101]

4–031 Despite this movement and legislative enforcement in some areas, there remain concerns that the use of plain language can detract from the precision of legal writing. Critics argue that ordinary terms can be vague and ambiguous when compared to technical legal terms. They fear that the translation of legal concepts such as promissory estoppel, consideration, or *quantum meruit* into plain English will lead to confusion and ambiguity rather than clarity. In part, this derives from a lawyerly preference to reuse the same words and phrases that have settled meaning through judicial consideration.

4–032 Among professionals from the same field, jargon and technical terms function as a system of precise shorthand. In medicine, "irregular heartbeat" in plain English may be more precisely referred to as arrhythmia, tachycardia or bradycardia among cardiologists. Similarly, and keeping in mind that good legal writing is always helpful, the decision as to whether to use jargon should be based on a consideration of the reader. What is plain language to a judge will be different to that for a non-lawyer. Therefore, while it is important to use plain language as much as possible in legal writing, it is not necessary to entirely exclude technical terms. The decision should be made based on the reader: what would be the most clear and helpful language for him or her?

(C) Be accurate

4–033 Clarity also requires accuracy. Say what you mean as precisely as possible. Choose words that convey accurately what you intend to say.

4–034 At the most basic level, recall that Lord Denning, to avoid confusion, preferred to use the real names of parties rather than generic yet technical terms such as plaintiff and defendant, appellant and respondent. This has the advantage of being precise. Ms Donoghue is not merely another plaintiff, but a specific person who has a certain set of experiences. It also helps to keep things clear when there are multiple plaintiffs or defendants. Rather than the

99 Plain Writing Act of 2010 (Pub. L. 111-274).
100 Exec. Order No. 13,563, Fed. Reg. 3821 (18 January 2011).
101 Exec. Order No. 12,866, Fed. Reg. 51736 (4 October 1993); and Exec. Order No. 12,988, Fed. Reg. 4729 (5 February 1996).